UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MICHELLE ANN CICCIARELLA,
individually and on behalf of all
others similarly situated,

Plaintiffs,

-against-

19 Civ. 8785
Bench ruling

CALIFIA FARMS LLC,

Defendant.

----------x

United States Courthouse
White Plains, New York

July 9, 2020

HONORABLE CATHY SEIBEL,
District Court Judge

REESE RICHMAN LLP
Attorneys for Plaintiffs
BY: MICHAEL R. REESE

-and-

SHEEHAN & ASSOCIATES PC
BY: SPENCER SHEEHAN

DAVID BIDERMAN
Attorney for Defendant

THE CLERK: In the matter is Cicciarella v Califia Farms LLC. On the line we have for class plaintiffs Mr. Michael Reese, and Mr. Spencer Sheehan, who is just listening in. And we have for defendant Mr. David Biderman. Josh is on the line, and Angela is on the line.

THE COURT: Good morning everybody. Let me just remind you that -- hold on one second. Sorry. Sorry, I had a very loud air conditioner.

If you say anything, the first word out of your mouth should be your last name. Don't say: This is Michael Reese for plaintiffs." Just say "Reese," so that the court reporter knows right up front who is speaking. And for the sake of the court reporter, we will skip the usual pleasantries.

My first question is whether we have any objectors on the line. Is there anybody who's here to object to the settlement?

NICOLE CROSS: Cross, Nicole. I am.

THE COURT: I'm sorry, say your name again.

NICOLE CROSS: Nicole Cross.

THE COURT: Spell your last name.

NICOLE CROSS: C-R-O-S-S.

THE COURT: Cross, Ms. Cross. All right, let me pull up your written objection.

Mr. Reese, can you perhaps point me to which exhibit to which document would contain Ms. Cross' objection, assuming

she submitted a written objection.

MR. REESE: Good morning, your Honor. Yes, we submitted that to your Honor yesterday as part of plaintiffs' supplemental reply because we did not receive Ms. Cross' objection until actually earlier this week.

THE COURT: Okay.

MR. REESE: It's docket entry 26 filed on July 8 this year, 2020, and Ms. Cross' -- it's Exhibit A.

THE COURT: Yes, I found it.

MR. REESE: Thank you, your Honor.

THE COURT: Thank you. It's document 26-1, but the letter is dated May 18, 2020, but the envelope in which it arrived was not postmarked until June 29th, which is after the deadline, and it was sent to the lawyer rather than the claims administrator, but it essentially raises the same issue that a couple of other objectors raised, which is the misconception that the penalty to consumers, that the payment to consumers ought to be the same as the FTC penalty of 42,000 and change per deceptive act.

Ms. Cross, if there's anything you want to add beyond what's in your letter, I'll hear you now.

NICOLE CROSS: I did want to add that I sent out the letter to New York office and I didn't get a response, so I resent it again through certified to everybody, and I see that it did go through to the parties intended.

I am objecting because to me the $15 is unfair. I've been purchasing this product since 2015, and to me, I don't mind paying for a higher price, which I do pay because I still drink the product because I'm addicted to it at this point, but to be deceived at the level -- what I'm saying is that I've been drinking it since 2015, and I just don't like the fact that I've been bamboozled because it's now $4 for each time I have to purchase it, and that's just unreasonable for something that I'm not really getting. You know, you're told you're getting one thing, and it's implied it's one thing, but it's actually another. Like I could have chose a whole different brand for a cheaper price and used my money towards other things. I just don't feel that's fair.

THE COURT: All right. Thank you, Ms. Cross.

Is there anybody else who's here to object?

(No response)

THE COURT: All right, I have a couple of questions for Mr. Reese. You report via your claims administrator that you've gotten a little over 60,000 claim forms as of July 2nd; has someone calculated the total dollar value of the claims, how much of the 3 million is going to be paid out?

MR. REESE: No, your Honor, and I would also note that the claims period does not close until October 1st, so we're a little over halfway through the claims period. We're receiving on average about 4,000 new claims a week. We receive

a weekly update from the claims administrator, but the response to your answer is no, that calculation has not taken place.

THE COURT: Okay, I hadn't focused on the fact that the claims period is still open.

And is what I'll call the ad campaign going to continue through October?

MR. REESE: Your Honor, I believe the ad campaign was completed in early June. The reach has been actually more than your Honor suggested, it's 80.4 percent. There are still roughly the same amount of claims coming in because I think that the campaign was widely spread and the claims can be made online through the settlement website, and that, in fact, is how most of the claims are being made. I would say 99.9 percent of the claims are being made online. I think 15 out of the roughly 60,000 claims have been mailed in. So for ease and convenience for the class members, they are taking advantage of the online claim form.

THE COURT: It wouldn't shock me if the numbers sank the further out we got from the notifications, but we'll see.

Also a question about the class representative's involvement in the litigation and how much time they spent on the case.

First of all, were all the class representatives for whom you're seeking a service award equally involved in the case?

MR. REESE: Yes, your Honor.

THE COURT: And what exactly did they do? Did they give depositions? Did they have to travel? Did they go to the mediation? Did they review documents? You know, what exactly did they do and how much time did they spend doing it?

MR. REESE: They spent a fair amount of time, I would say several hours each reviewing documents pertaining to both the complaints, the allegations in the complaint, the settlement proceedings, including there were several mediations, too, in front of Judge West, and one in front of Judge -- I'm sorry, in front of Donald Morrow. He's not a judge, but he's an esteemed mediator with JAMS. We communicated with them extensively regarding both at the mediations as we were drafting settlement papers and since then.

No depositions occurred, but there is still extensive work done. And this, as we point out in the papers, this matter -- there were two matters that this case would resolve if the settlement's approved by your Honor that has been pending for roughly two years.

THE COURT: So they didn't attend the mediation, but you conferred before, and during, and after; is that fair to say?

MR. REESE: That's correct, your Honor. The mediations were held in California in Orange County and some of

the plaintiffs were located in New York. So we thought it made sense, and we had the agreement of the defendants and the mediator as well, that they could participate via phone.

THE COURT: All right, let me tell you all where I come out.

It's plaintiff's motion seeking final certification of the class for settlement purposes only, approval of class settlement and award of attorneys fees and costs to plaintiffs' counsel and payment of incentive awards to the named plaintiffs.

I presume everybody's familiarity with the underlying facts and the procedural history of the case, and I incorporate by reference the summary of facts and procedural history that I provided when we convened on March 5th, as well as those set forth in plaintiffs' memo in support of its motion, which is docket entry 23-1 at pages 1 to 4.

Since that conference on March 5th, plaintiffs had made three additional submissions at docket entries 23, 25 and 26, and they also I guess between March 5th and those supplemental submissions plaintiff submitted supplemental declaration and a proposed preliminary approval order that addressed certain issues I raised at the conference, specifically regarding the notice plan and removing language concerning the injunction. I granted preliminary approval on March 20th, that's docket entry 22, and the motion, the instant

motion, was filed on the 28th of May.

The main terms of the settlement agreement are as follows:

First of all, the class consists of all consumers in the US who purchased the specific products during the class period with certain exclusions. The class period is August 7, 2014, through March 20th of this year. The settlement amount is capped at $3 million. A settlement class member who submits valid claim with proof of purchase will get a dollar for each product purchased up to 20 products. A member who submits a claim without proof of purchase gets 50 percent up to a maximum of ten. The total value of claims submitted with proof of purchase is capped at $2 million, and if it exceeds that number, the benefit for each claim will be reduced on a pro rata basis. The total dollar value of claims submitted without proof of purchase will be capped at $1 million with the same reduction.

By plaintiffs' calculation, the inflated amount that consumers paid for defendant's products as a result of the deception, which defendants don't concede, is .61 cents, which means that if the claims stayed within the cap, class members will receive more than 100 percent of the inflated amount if they have proof of purchase, and 81 percent of the inflated amount without proof of purchase, although there may be class members who purchased more than 20 products or 10 products. So

that number may not represent all of their purchases.

Defendant agrees to make changes to its labeling as part of the agreement within two years of final approval. The changes are in the settlement agreement at paragraph 3.1, (a) through (f), and include specifying vanilla with other natural flavoring rather than vanilla and/or reformulating as necessary to make the ingredient panel reflect "vanilla extract with other natural flavors," and also changing "chocolate" to "cocoa" for another descriptor or reformulating, and changing "hazelnut" to "hazelnut with other natural flavors" and so on.

Class counsel is requesting $750,000 in fees and expenses, which is the maximum allowed under the agreement. The defendant is responsible for all the fees and expenses incurred by the claims administrator. The agreement calls for $5,000 per class representative as a service award for a total of $30,000. The fees, costs and service awards do not reduce the settlement fund, they are on top of the fund.

And upon final approval, plaintiffs and the class members will release defendants from any claims that could have been asserted relating to labeling regarding vanilla, carrageenan, chocolate, sugar, other ingredients, colors or flavors. Sorry. Chocolate, nut, sugars, or other ingredients, colors or favors.

And the parties agree that final approval will fully resolve the case before me, as well as class claims asserted in

the California state litigation.

So turning first to Rule 23, as I claimed on March 5th, plaintiffs have shown numerosity, commonality, typicality, adequacy, ascertainability, predominance, and superiority, and I incorporate by reference my previous rulings on the 23(a) factors 23(b)(2) and 23(b)(3) requirements as well as plaintiffs' analysis in their memorandum at pages 18 to 24.

Now with respect to final approval, Rule 23(e)(2) requires a hearing and a finding that the settlement is fair, reasonable and adequate. When a settlement is negotiated before the class is certified, the proposed settlement is subject to a higher degree of scrutiny in assessing its fairness. *In re Sony* 2008 WL 1956267 at *5 (S.D.N.Y., May 1, 2008).

In evaluating the fairness of a proposed settlement, the Court must look at the procedural fairness, that is, the negotiating process culminating in the settlement and the substantive fairness of the settlement terms. *See McReynolds versus Richards-Cantave*, 588 F.3d 790, 804. I have the responsibility to determine whether the settlement properly protects the interests of the absent class members weighing the remedies the class will obtain from the settlement against the probable costs and results of continued litigation.

Regarding procedural fairness, as I found on March 5th, the evidence suggests the settlement agreement is

procedurally fair. Class counsel engaged in substantial discovery and negotiated the settlement with defendant at arm's length after three full days of mediation with JAMS, which raises a strong presumption of fairness. *The City of Providence versus Aeropostale*, 2014 WL 1883494 at *4 (Southern District of New York, May 9, 2014) *aff'd*. 607 F.App'x 73; *see also Elkind versus Revlon*, 2017 WL 9480894 at *17 (E.D.N.Y., March 9, 2017) Report and Recommendation adopted 2017 WL 1169552 (E.D.N.Y., March 29, 2017); *Stinson versus City of New York*, 256 F.Supp. 3d 283, 289 (S.D.N.Y., 2017); and *In re Bear Stearns*, 909 F.Supp. 2d at 259, 265 (S.D.N.Y., 2012), all of which note that that having a neutral involved and arm's length mediation sessions suggests procedural fairness. Here, counsel are also sufficiently experienced and have the requisite ability to handle these types of cases, so I conclude the settlement resulted from arm's length negotiations and that counsel possessed the experience and ability and engaged in sufficient discovery necessary to effective representation of the class' interests. Essentially for the reasons I outlined at the preliminary approval stage, there's no evidence of bad faith, fraud, or collusion, so I find the procedural fairness requirement satisfied.

Turning now to substantive fairness. I consider the four factors set forth in new Rule 23(e)(2) in addition to the nine so-called *Grinnell* factors, the courts in the Second

Circuit used before the recent amendments to Rule 23. *See Johnson versus Rausch, Sturm, Israel, Enerson & Hornik*, 333 F.R.D. 314, 320 (S.D.N.Y., 2019). I won't take the time to read the Rule 23(e)(2) factors. We can all look them up or know what they are. Nor will I take the time to recite the nine factors in *Detroit versus Grinnell*, they can be found at 495 F.2d 448, 463. *See also McReynolds*, 588 F.3d at 804. Not every factor must weigh in favor of settlement, but rather the court should consider the totality of the factors in light of the particular circumstances. *In re Global Crossing*, 225 F.R.D. 436 (S.D.N.Y, 2004).

In light of these factors, I find the settlement is substantively fair, as I explained at the previous conference and which I continue to believe.

First the complexity, expense, and likely duration of litigation. The issues are not terribly complex, but they're not simple either, and further litigation would result in additional and significant expense and delay. The parties have already undertaken considerable discovery but further litigation without settlement would entail more discovery and probably motion practice as well, including plaintiffs' likely Rule 23 motion as well as defendant's potential decertification motion. Defendants have only agreed not to impose certification as part of the settlement but in all likelihood would if the settlement were rejected. Then there would be

dispositive motion practice. If the case survived that, disposition of the issues would require a lengthy and costly trial to establish liability and damages and then there would be post-judgment appeal. Accordingly, this factor weighs in favor of settlement.

The next factor is the reaction of the class to the settlement. The deadline to object to opt out was June 11. Nobody opted out, and only four class members timely objected. Three others objected after the June 11 deadline. So far the claims administrator has already received 60,193 claim forms. The small number of objections can be viewed as indicative of the adequacy of the settlement. *Wal-Mart versus Visa,* 396 F.3d 96, 118.

Turning to the objections, plaintiffs argue all of the objections are improper because they lack declarations, they failed to state whether the objectors intended to appear today, and they were not submitted to the claims administrator at the address stated in the notice. Further, three of them were untimely. While that is all true, I will address the objections anyway. I find them insufficient to upset the settlement. Two of the objectors asked for mediation; one on the grounds that the settlement amount is inadequate, and one without explanation. As discussed, however, the parties have already engaged in mediation and those objectors provided no reasoned basis for altering the settlement amount that that

mediation process generated. The other five objectors similarly state that the settlement amount is inadequate and they contend they're entitled to over $40,000 under the Federal Trade Commission Act, or FTC Act, for every mislabeled product purchased from the defendant. This amount appears to be derived from the maximum civil penalty under Section 5 of the FTC Act. See 16 C.F.R. at section 1.98. The most glaring flaw with these objections is that there's no private right of action under the FTC Act. *Lokai Holdings versus Twin Tiger* (S.D.N.Y., 2018). And none of the objections explains why a recovery of over 100 percent of the inflated amount of defendant's products with proof of up to 20 purchases or 81 percent of the inflated amount without such proof for up to ten purchases is inadequate. As I'll discuss, there are risks to this litigation, a possibility that any given class member could end up with nothing. So I overrule the objections and I find that the overwhelmingly positive reaction of the class in the settlement weighs in favor of approval.

The third factor is the stage of the proceedings and the amount of discovery completed. There's been considerable discovery, so this factor also favors settlement.

The next two factors are the risks of establishing liability and damages. Plaintiffs' counsel explains that this class action litigation is fraught with risks at every stage, and at the end of the day, while plaintiffs believe a

reasonable consumer would find the challenged claims to be misleading, a jury might not agree. That is entirely possible. The jury could find that there's nothing deceptive about calling a product vanilla when, in fact, it contains vanilla and tastes like vanilla. Indeed, defendant has denied all the claims or that anyone has suffered damages or harm as a result of any mislabeling. They deny there's any mislabeling to begin with or any false marketing. So if the litigation were to proceed, at the very least plaintiffs' attempt to establish liability would be met with resistance and a favorable outcome is far from certain. Likewise, because almost nobody maintains their grocery receipts, the amount of damages that everybody would be entitled to would be based simply on an individual plaintiffs' word, which might be met with skepticism, and it also might be met with skepticism whether the alleged mislabeling would matter to every single class member. So the proposed settlement alleviates the uncertainty concerning the outcome and duration of the litigation and the amount of damages. So it weighs in favor of approval even though there likely are many class members who bought more than 10 or 20 of the products, and therefore, they're not getting directly 100 percent or 81 percent of the inflated price, but even if they're getting a much smaller percentage, they are still getting something that's real and definite and they're getting it now as opposed to having to wait perhaps three years and

perhaps not getting anything.

The next factor is the risk of maintaining the class action through trial. Defendants likely to challenge class certification. But as a practical matter, I don't see much of a risk that plaintiffs will not be able to maintain a class without the trial, so this factor weighs against the settlement.

The ability of the defendant to withstand a greater judgment is the next factor. Plaintiffs concede defendant probably can withstand a greater judgment, but that fact does not, standing alone, indicate a settlement in unreasonable or inadequate. *In re Paine Webber*, F.R.D. 104, 129 (S.D.N.Y., 1997), aff'd 117 F.3d 721. That factor is neutral here.

And the last two factors are the range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation. To assess the range of reasonableness, courts factor in the uncertainties of law and fact in any particular case and concomitant risks and costs necessarily inherent in taking any litigation to completion. *Wal-Mart*, 396 F.3d at 119. The settlement agreement provides a refund for consumers with proof of purchase of more than 100 percent of the inflated portion of the price they paid for defendant's products up to 20, and 81 percent for consumers without proof of purchase up till 10 for a total value of $3 million. This result, especially with

the latter group that doesn't have proof of purchase, may be better than what could be achieved after trial, maybe not. The settlements agreement also provides injunctive relief as it requires defendant to change its labeling so as to not mislead anyone, and the continued litigation would be costly and complicated. Considering the costs of future litigation, the risks attendant with moving forward with it and the relief the class will receive, I'm satisfied that the settlement is a reasonable compromise and this factor weighs strongly in favor of settlement.

With respect to the Rule 23(e)(2) factors, I've already explained that plaintiffs and class counsel have adequately represented the class and that the settlement was a result of arm's length negotiation. I also find that relief provided for the class is adequate taking into account the costs, risks and delay of trial of appeal, as well as the effectiveness of settlement administrator's method of processing claims. Further, the proposed award of attorney's fees favors approval because it does not reduce the size of the fund available to class members, and the only agreement under 23(e)(3) concerns how plaintiffs' counsel have agreed to split the fees. Additionally, the settlement treats class members equitably relative to each other, as members who have purchased more of defendant's products receive a greater settlement amount up to a point than members who have purchased fewer and

class members without proof of purchase are still getting a percentage, a significant percentage of the amount they overpaid.

So finding the settlement both procedurally and substantively fair, final approval is proper.

I now turn to the sufficiency of the notice. There are no ridged rules to determine the adequacy of notice in the class action. The standard is generally that of reasonableness. Notice need not be perfect, but only the best notice practicable under the circumstances, and each and every class member need not get actual notice so long as class counsel acted reasonably in choosing the means likely to inform potential class members. *In re Merrill Lynch*, 249 F.R.D., 124, 132-33 (S.D.N.Y., 2008).

I appointed KCC to administer the notice process in accordance with the proposes settlement agreement. Since then they've provided the notice to the class members using the following methods: One, direct notice via email to 18,650 class members who bought defendant's products through its websites; two, publication in *USA Today*; three, publication on various websites and social media platforms, *Facebook*, Instagram and *Twitter*; four, the creation of a settlement website; and, five, the maintenance of the toll-free hotline. The claims professional estimates that the notice plan has reached 80.4 percent of likely class members, an average of 2.7

times each.

The notice plan's multi-faceted approach to providing notice to class members constitutes the best notice practicable under the circumstances consistent with Rule 23(c)(2)(B). *See e.g., In re Holocaust Victims Assets Litigation*, 105 F.Supp. 2d, 139, 144 (E.D.N.Y., 2000), which approved a plan which involved direct mail, publication, press releases, and earned media, internet, and other means. The direct mail notice complies with the rule that notice should be provided to members who can be identified through a reasonable effort, *see Eisen versus Carlisle & Jacquelin*, 417 U.S. 156, 173, and the estimated percentage of identifiable class members who will receive notice is in line with what other courts across the country have considered adequate for purposes of due process and Rule 23. *See, e.g. Mayhew versus KAS*, 2018 WL 3122059 at *9 (S.D.N.Y., June 26, 2018), which was a 70 percent reach*; In re Building Materials*, 2014 WL 12621614 at *7 (D.S.C., October 15, 2014), which was above 80 percent*; In re Zurn Pex Plumbing*, 2013 WL 716088 at *8 (District of Minnesota) 80.6 percent; and, *In re HP Ink Jet*, 716 F.3d 1173, 1176 (Ninth Circuit, 2013), which reversed on other grounds a settlement that was going to reach 74 percent of class members.

So I find the provisions regarding direct notice and publication appear reasonable and adequately aimed at providing actual notice to the class members.

Plaintiffs move for a $5,000 incentive award to each of the named plaintiffs, that's Ms. Cicciarella, Ms. Rietsyk Mr. Mitchell, Ms. Pena, Ms. Villanueva, and Ms. Landeros, for a total of $30,000. "In this circuit, the courts have with some frequency held that a successful class action plaintiff may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award termed the incentive award. The guiding standard in determining a incentive award is broadly stated as being the existence of special circumstances, including the personal risk, if any, incurred by the plaintiff applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation, or in bringing to bear added value, for example, factual expertise, any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and of course, the ultimate recovery." *Roberts versus Texaco*, 979 F.Supp. 185, 200 (S.D.N.Y., 1997).

Here, the proposed incentive awards will not reduce the amount available to unnamed class members, and $5,000 represents a tiny percentage, less than .02 percent, of the total settlement fund, but $5,000 is 250 times the maximum amount that a class member can receive, which is $20. Plaintiffs have not identified any personal risks they've

incurred. They, according to counsel, have expended time and effort in conferring with plaintiffs' counsel and participating indirectly in the mediation. In one similar case, that's been enough to justify an award of this size. *See McLaughlin versus IDT*, 2018 WL 3642627 at *15 (E.D.N.Y., July 30, 2018) where a $6,000 was found appropriate where the class representatives didn't run any risk, bring any special expertise or participate in the case beyond consulting with their lawyers. Report and recommendation adopted in relevant part, October 16, 2018. In another similar case, $5,000 was found to be appropriate where plaintiffs provided advice to counsel and participated in settlement and mediation discussions. *See Edwards versus North American Power & Gas*, 2018 WL 3715273 at *13 (District of Connecticut, August 3, 2018).

In other consumer protection lawsuits, however, courts have required an reward of $5,000 to be justified as reasonable at the fairness hearing. *See, e.g., Elkind versus Revlon*, 2017 WL 9480894 at *18 (E.D.N.Y., March 9, 2017), which requires the proposed award of $5,000 to be justified where the named plaintiffs did not risk anything or lend special expertise, R&R adopted 2017, WL 1169552 (March 29, 2017); and, *Berkson versus Gogo* (E.D.N.Y., 2015) to the same effect. Absent a more significant showing, a lot of cases have found 2500 to be a more appropriate incentive award. *See, Pantelyat versus Bank of America*, 2019 WL 402854 at *10 (S.D.N.Y.,

January 31, 2019); *Melito versus American Eagle*, 2017 WL 3995619 *16 (SDNY, September 11, 2017), aff'd in part, appeal dismissed in part, 923 F.3d 85; and, *Zink versus First Niagara*, 2016 WL 7473278 *4-5 (W.D.N.Y., December 29, 2016); and, *In re Sinus Buster*, 2014 WL 5819921 at *19 (E.D.N.Y., November 10, 2014).

Given the representations made by counsel this morning and the fact that the $5,000 is not going to come out of the amount available to the class members, although it is a close call, I will approve the proposal that the named plaintiffs get $5,000. The case has gone on for some time, so the consultations with counsel were time consuming, and counsel has represented that they, the plaintiffs did -- what were involved in the mediation through counsel. So although I think $2,500 would be reasonable as well, I will approve the $5,000 given that it's not coming out of the pockets of the class.

Turning to attorneys fees. Class counsel seek fees and reimbursement of expenses of $750,000, which is 25 percent of the settlement fund. Again, this amount is in addition to and does not reduce the amount of the settlement fund. That fact reduces my role in overseeing the award because there's no conflict of interest between the attorneys and the class members. *Schwartz versus Intimacy in New York*, 2015 WL 13630777 at *6 (S.D.N.Y., September 16, 2015). Class counsel in a class action settlement may be entitled to a reasonable

fee. *Pantelyat* *8, quoting *Goldberger versus Integrated Resources*, 209 F.3d 43, 47. "Whether a fee in a common fund case is reasonable may be determined by using either the lodestar method, in which the court ascertains the number of hours reasonably billed to the class, multiplies those hours by a reasonably hourly rate and applies any appropriate adjustments, or by setting a reasonable percentage of the recovery as a fee. In light of the strong consensus, both in this circuit and across the country, in favor of awarding attorneys fees in common fund cases as a percentage of the recovery, the court applies the percentage-of-the-fund method in this case with a lodestar cross-check to confirm its reasonableness." *Pantelyat* at *8. Under either method, the courts evaluate the reasonableness of the resulting fee by considering the following factors articulated in *Goldberger*: One, counsel's time and labor; two, the case's magnitude and complexities; three, the risk of continued litigation; four, the quality of the representation; five, the fee's relation to the settlement; and, six, public policy consideration. Under these metrics, I find that 25 percent of the settlement fund is fair, reasonable -- as a fee award equivalent to 25 percent of the settlement fund is fair, reasonable, and adequate.

Looking first at the *Goldberger* factors, they favor approval on balance. Plaintiffs' counsel spent a collective 1098.55 hours on the lawsuit, which began in California state

court in August 2018 and this court in September 2019. This is not a huge number of hours and settlement during the early stages of the litigation weighs against the large award, but substantial discovery was conducted, and the speed with which the litigation was resolved can also reflect high quality representation. *See Pantelyat* at *9. The quality of counsel's representation is also reflected in the favorable recovery achieved for the class in terms of money and injunctive relief. As I've stated, the issues are not terribly complex but they're not simple either, and there would be significant risk if litigation continued, making a favorable damages award far from certain. A fee amounting to 25 percent of the settlement fund is comparable to or lower than what other courts have found reasonable in similar cases. *See Pantelyat* at *9 where it was 25 percent*; Melito* at 20 where it was 30 percent. And here, where individual lawsuits against the defendant would not be viable due to the dollar amounts involved, public policy favors rewarding counsel for pursuing the claims as a class. *See Pantelyat* at *9. Additionally, the fact that plaintiffs' counsel negotiated the amount for fees and costs only after reaching agreement as to the relief for the class, also weighs in favor of its reasonableness. *See Shapiro versus JPMorgan*, 2014 WL 1224666 at *25 (S.D.N.Y., March 24, 2014).

I next perform a lodestar cross-check to verify the reasonableness of the requested fees in which I multiply the

number of hours reasonably expended by the prevailing rates for the services provided to generate a lodestar figure and compare that figure to the requested fees. The lodestar should be based on prevailing market rates. *Pantelyat* at *9.

Class counsel calculates the lodestar at $879,762.50. I came out to a number that was $739.50 lower by summing up the amounts stated in counsel's declarations. Regardless, the requested $750,000 is less than the lodestar, it's about 80 percent of the lodestar. But to reach that amount counsel use hourly rates that average 800 an hour with the range of $775 to $975 per hour for partners and $525 to $600 per hour for associates, which are significantly higher rates than those used in district in comparable litigation. *See Schwartz* 2015 WL 13630777 at *7, which collects cases and describes an average of $462.50 per hour for partners as being on the high end of reasonable rates.

These rates to my mind are not the prevailing market rates, particularly the associate rates are higher than the market will bear. Even if I have counsel's hourly rates, however, their lodestar would be $439,863.25, which would make the requested $750,000 approximately 1.7 times the lodestar amount. This is well below multipliers that have been found to be reasonable in similar cases. *See, e.g., Pantelyat* at *10.

So I find the total fee request to be fair, reasonable, and adequate. I am not finding the hourly rates to

be appropriate, and should in ruling make its way into any future applications, counsel should make clear I am not finding those hourly rates to be fair and reasonable, but I am finding the total fee to be fair and reasonable because even if I cut those rates in half, the multiplier is only 1.7.

I also find that the litigation expenses of $29,657.42 are reasonable. If I didn't already say it, I also find the hours that were put in to be reasonable. So I approve counsel's request for $750,000 in fees and expenses.

So the motion is granted, and if they haven't already, plaintiffs are to submit a proposed order in accordance with this ruling, and the Clerk of Court is to terminate motion number 23.

Mr. Reese, have you given me a proposed order or will you give me one in the next few days?

MR. REESE: Yes, your Honor, we will. One question for your Honor. Do you want us to first get the transcript so that we can cite the cases that you just read into the record?

THE COURT: I don't think you need to do that. I think you can say, for the reasons stated on the record and on this date, and then just put the conclusion. I don't think you have to include the reasoning.

MR. REESE: Thank you, your Honor. And I think we did this with the preliminary approval order, I email to your chambers; is that correct, your Honor?

THE COURT: Yes, that's fine. And if you would, email it in Word format in case we want to tweak it at all.

MR. REESE: Understood, your Honor. Thank you very much.

THE COURT: All right. Anything else we should do this morning?

MR. REESE: Not on behalf of the plaintiff. Thank you again, your Honor, for your time and consideration of this matter.

MS. MABEL-DOROTHY: How do we get to speak?

THE COURT: I'm sorry --

MS. MABEL-DOROTHY: My name is Qadriyyah Safiyyah Mabel-Dorothy, Q-A-D-R-I-Y-Y-A-H, S-A-F-I-Y-Y-A-H, Mabel-Dorothy. M-A-B-E-L, hyphen, D-O-R-O-T-H-Y.

THE COURT: Are you a member of the class, ma'am?

MS. MABEL-DOROTHY: I am a member of the class. Yes, ma'am.

THE COURT: And are you here to object?

MS. MABEL-DOROTHY: No, ma'am, I'm not here to object at all. I want to be grateful and appreciative of all the work that have gone into this case.

I wrote to Michael Reese to let him know that the $15 for the non-receipt amount I know comes with a higher compensation than the 15, and I didn't hear that conversation in this proceeding at all, other than when you calculated that

the $15 based on the no receipt is 50 cents, and the cost difference between Califia Farms and let's say Almond Breeze was like .61 cents. So that's the only conversation I heard about the $15, and so I'm wondering when is Michael Reese going to bring in the conversation he and I discussed.

THE COURT: All right. Well, I see that you sent an email to Mr. Reese. At the beginning of the proceeding I asked if anybody was here to object to the settlement and one person spoke up, but I didn't hear that you were there. I did address, and I don't know if you were on the line --

MS. MABEL-DOROTHY: Yes, because I'm not objecting, your Honor, I'm not objecting to the settlement. I just said I'm in agreement with all that you said, and that's why I was listening to hear if there was more for me to agree to and I didn't hear -- I didn't hear class members receiving the full compensation that is available to us, only the compensation that was agreed to.

THE COURT: Well, that's right. That's how it works with a settlement. I mean, the defendants claim they didn't do anything wrong and that if this case went to trial, they would win. Plaintiffs obviously claim the opposite, and when cases settle, the plaintiffs get less than what they would get if they prevailed, and the defendants pay more than what they would pay if they prevailed. So you are correct that what you'll be getting if you don't have proof of purchase is less

than the overpayment but --

MS. MABEL-DOROTHY: Right, but that's what I'm saying, your Honor, that's not the calculation. Like the calculation for this violation isn't based on the difference between which milk I bought. That's not how you base the calculation. And if we went to trial and we won, then $15 is less than 1 percent of what you would get if you won. So like that's what I'm saying -- that's why I said it's insufficient.

THE COURT: Well --

MS. MABEL-DOROTHY: Being this is the final hearing, this is when we would talk about its insufficiency, but I didn't hear that get discussed.

THE COURT: Well, I did talk about this because other people raised the same argument that you mention in your email that the deceptive act makes you entitled to 40,000 times 15, and I think you're getting that from the FTC Act, and I did discuss this, and maybe you weren't on the line at the time but --

MS. MABEL-DOROTHY: I've been here. I was here the whole time.

THE COURT: One of the factors I did discuss is the reaction of the class to the settlement, and I discussed people who wrote, whether they used the word objection or not, the people who wrote in, and there were a total of people five people who wrote in saying that they are entitled to $40,000

under the Federal Trade Commission Act for every mislabeled product, and that's just incorrect under the law. There's no -- individuals don't have any right to relief under the FTC Act, only the government can bring claims like that. So it's actually not true that a consumer is entitled to $40,000 for a product, and I did mention that at the beginning. So I overruled those objections, which you're not the only one who raised it, but it's just not a correct statement of the law, unfortunately. So the --

MS. MABEL-DOROTHY: Okay, so what my question was was to Michael Reese, as class counsel, isn't that a conversation for him to have when I am having the conversation with him and also because you just discussed his fee, and you just discussed all the work he did, and as a class member, he didn't do no work on my behalf. In fact, if I'm telling him that I think I get $40,000 because the FTC says something, and you're telling me that 40,000 goes to the government, it doesn't go to me, then Mr. Reese, as my class counsel, has all the wherewithal to find out what fees come directly to the consumer so that we don't keep having class actions where the class members get $20 to $15 and the attorney is getting $700,000 and the cost to maintain a 800 number that you just told them to put up is going to receive more moneys based on a $20 claim?

So I'm saying to Mr. Reese, as my class counsel, that you include in the fees that he just did work in, I just told

you what he did. So I feel like if there's a way for you to calculate the five people that he blatantly ignored and could have worked on our behalf, there is a way for you to calculate that like the abandonment of class members. Where's that act?

THE COURT: I will say two things, one is, he should have responded to your email. He is your lawyer. He brought it to my attention that he received this on July 3rd. It looks like it was originally sent on May 28th, and I don't know why there was no response to that.

I think he took the email, and he'll correct me if I'm wrong, as an objection, not as a question, but the fact remains that this is what always happens in class actions. This is a case where there's no one individual for whom it would make sense economically to bring this lawsuit. So it wouldn't make sense for you to go out and hire a lawyer and pay the lawyer hundreds of dollars an hour to sue the defendant over your own personal purchases of milk. It only makes sense to do cases like this on behalf of a lot of consumers. And in deciding whether to approve the settlement, one of the things I look at is the reaction of the class to the settlement. What we had here is over 60,000 people were fine with the settlement and there were I think eight who weren't. So that's one of the things I look at.

The fact of the matter is nobody is going to sue individually. So nobody is going to get anything apart from

the class action. The 40,000 that some people were under the mistaken impression they're entitled to, they're not entitled to. And it's a settlement, and a settlement means to avoid the uncertainty of the outcome, and it's by no means certain that the plaintiffs would prevail here, and to get the money now instead of years from now, and to avoid all the risks and delays of litigation, the plaintiffs are going to agree to take less than they think is ideal, and the defendants are going to agree to pay more than they think is ideal, and both sides are going to be less than fully satisfied, and that's usually the sign of a good settlement.

So I appreciate your points. You make some good points, which is, there are sometimes class actions where you don't see very much benefit for the class and the only people who make out are the lawyers, but this is not one of those cases. This is a case where so far 60,000 plus people are going to get money, not a lot of money, but they wouldn't get a lot of money even if the plaintiffs ran the table here. So this is not the kind of case where anybody's going to retire off of.

MS. MABEL-DOROTHY: Your Honor, I have two statements to make after what you just said.

First of all, as a class member, am I privy to -- what was it, 60,000? Did you say 60,000 or 6,000?

THE COURT: The number of people who have made claims

is a little bit over 60,000.

MS. MABEL-DOROTHY: 60,000. 60,000. Okay. So, those are not the active class members, the ones who brought this class action to the court; right?

THE COURT: There are six named plaintiffs who brought the case, and then there are 60,000 class members who put in claims.

MS. MABEL-DOROTHY: Exactly. So you know how you just said that the six original ones who brought the case they get incentive pay for like, you know, just having the energy and wherewithal to stay consistent. What do the people who did that as well that are not a part of the case, where do those incentive comes in for us? Because it just seems like you're intentionally calculating a lot for the bulk of the class members. It literally seems like your math is suggestive of we weren't going to get anything anyway, we weren't going to bring it individually, and if we did we wouldn't get anything, so unless you get this quick $20 while we can -- how is that even legal math?

THE COURT: Well, I'm not going to --

MS. MABEL-DOROTHY: The courts are supposed to be for the people. It hasn't sounded yet like your math is equally for the people. It sounds like your math is equaling for the corporation, they didn't pay as much as they were going to pay if they keep going with this, and the attorneys who, you know,

they did get their fair share, even though I told you they ignored the people, and are we going to hear from Michael Reese as to why he ignored us?

THE COURT: So I'm not going to get into an argument with you, Ms. Mabel-Dorothy. I've spent an hour putting on the record my analysis of the motion to approve the settlement and if you haven't made a claim, you don't have to make one. But I'm approving the settlement. I've considered all the factors I'm supposed to consider under the law. And I understand not everybody is satisfied with it, but the law doesn't require 100 percent of the class to be satisfied with it. And on balance, considering all the factors, I do find it is beneficial for the class, and that's my ruling.

So if there's nothing further, I'm going to expect Mr. Reese to submit his proposed order, which I will take under consideration.

All right, everybody, please stay safe and well, and I'm going to ring off at this time. These proceedings are concluded.

(Proceedings concluded)

CERTIFICATE: I hereby certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

Angela A. O'Donnell, RPR,Official Court Reporter, USDC, SDNY